Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

MICHEL THOMAS,

Petitioner,

v.

LOS ANGELES TIMES COMMUNICATIONS LLC, a Delaware limited liability company; ROY RIVENBURG, an individual; TRIBUNE COMPANY, a Delaware Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Anthony Michael Glassman
Counsel of Record
GLASSMAN, BROWNING & SALTSMAN, INC.
360 North Bedford Drive
Suite 204
Beverly Hills, CA 90210
(310) 278-5100
Attorneys for Petitioner Michel Thomas

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

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QUESTIONS PRESENTED

The court below affirmed dismissal of Petitioner's defamation complaint under the California anti-SLAPP statute (California Code of Civil Procedure § 425.16). The questions presented are:

1. When a newspaper article contains defamatory implications, does the First Amendment protect the newspaper from intentionally withholding facts known prior to publication, that, if disclosed, would defeat the defamatory implications?

2. Did the Court of Appeals for the Ninth Circuit misapply California law by imposing the "innocent interpretation" rule and dismissing Petitioner's Complaint under California Code of Civil Procedure Section 425.16 despite Petitioner's submission of overwhelming uncontested evidence that the defamatory implications alleged by Petitioner in his Complaint were present in the publication?

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PETITION FOR WRIT OF CERTIORARI

Michel Thomas ("Thomas") petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

1. The Court of Appeals' September 6, 2002 Memorandum decision affirming the judgment of the district court is unpublished and reproduced in Appendix ("App.") A, *infra*, 1a-5a.

2. The District Court's Order Re: Defendants' Special Motion To Strike Pursuant to Cal. Civ. Pro. Code § 425.16; Request For Attorneys' Fees and Costs pursuant To Cal. Civ. Pro. § 425.16(c) is reported at 189 F. Supp. 2d 1005 and reproduced in App. B, *infra*, 6a-25a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1332(a). The Court of Appeals' jurisdiction was based on 28 U.S.C. § 1291. This petition is being filed within 90 days of the Court of Appeals' September 6, 2002 final decision in this case. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment to the Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . ."

STATEMENT OF THE CASE

On Sunday, April 15, 2001, emblazoned across the front page of the Living Section of the Los Angeles Times were the words "Larger Than Life." The article that followed (the "Article") discussed (and discredited) the lifetime achievements of Petitioner Michel Thomas, a Polish born Jew, who, among other accomplishments, was interrogated by and escaped Klaus Barbie and served as a Special Agent of the United States Army Counter Intelligence Corps ("CIC") in WWII.[1] On its face, the Article was designed to appear as the result of months of extensive, global research. Indeed, statements in the Article were attributed to *bona fide* international experts, e.g., an "Army archivist", a "retired brigadier general and former justice of the Colorado Supreme Court"; a "German author who was on the scene working as a journalist for the U.S. Army", *et al.* Similarly, subtitles used in the Article ("Accounts of the Day Dachau Was Liberated"; A Cache of Nazi Party Membership Cards"; "Called as Witness Against the 'Butcher of Lyon'") were worded to give readers the

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[1] For the convenience of the Court, the text of the Article is reproduced herein as Appendix C, *infra*, 26a-41a.

impression that the Article reported verified factual accounts of significant historical events.[2]

Review and analysis of the Article, by persons interviewed before publication, persons quoted in the Article, "reasonable readers" and experts in journalism and linguistics, revealed the opposite to be true. The Article, which began with the words, "If everything he says is true . . ." did not contain objective reporting or a critical analysis of Petitioner's biography. Instead, by carefully manipulating words, phrases and information, the Article was intentionally crafted to imply that Petitioner had lied and fabricated each and every outstanding accomplishment of his life. The sole message conveyed by the Article was that Petitioner is a liar and a fraud.

Petitioner sought judicial relief by filing a defamation action in federal district court. Petitioner's complaint alleged that Respondents[3] defamed him by publishing false and defamatory implications about him which implied that he did not serve with the United States Counter Intelligence Corps during WWII; that he was not present at the liberation of Dachau; that he was

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[2] Respondents have argued below that the Article was a book review, because a biography of Petitioner entitled, "*Test of Courage*" was published in 1999, and the Article made repeated reference to the biography. The District Court acknowledged that the Article referred to the biography, but stated, "[T]he Court cannot find that the article is truly a book review." App.B, 19a. The Ninth Circuit did not address the issue.

[3] Petitioner named the Reporter, Roy Rivenburg (referred to herein as the "Reporter"), Los Angeles Times Communications, LLC, and it's parent company, Tribune Company, as Defendants. Those parties are referred to collectively herein as "Respondents."

not interrogated by and did not escape from Klaus Barbie during WWII; that he did not discover and secure a huge cache of Nazi government documents and Nazi Party membership cards; and, that overall, he has lied about, fabricated, and exaggerated events of his past.[4]

Petitioner's complaint was met by Respondents' Special Motion to Strike filed pursuant to California Code of Civil Procedure Section 425.16 (colloquially known as the "anti- SLAPP " statute). In response, and as required by the statute, Petitioner presented the district court with a mountain of evidence (almost all of which was uncontested) from laypersons, experts and other "reasonable readers" which established a "prima facie showing of facts that would, if proved, support a judgment in plaintiff's favor."[5]

Petitioner's evidence established that the alleged defamatory implications arose from the Article and that Respondents intended those implications. Petitioner submitted sworn declarations from persons who had provided Respondents with first hand accounts of facts which proved that Respondents' intended defamatory implications were false. Importantly, those declarations confirmed that all of this critical information was provided to Respondents before the Article was published.

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[4] Petitioner's complaint also included an allegation that the Article implied that his language teaching method is a sham, and not worth the fee charged. For purposes of this writ, Petitioner abandons that allegation.

[5] *Church of Scientology v. Wollersheim*, (1996) 42 Cal. App. 4th 628, 646 *and see*, Cal. Code of Civ. Proc. § 425.16(b)(1).

Despite this showing, the District Court, the Honorable Audrey Collins presiding, granted Defendants' Special Motion to Strike, finding that even though a reasonable reader "might conclude . . . that Thomas had in fact lied about his past", Respondents' conduct was protected by the First Amendment. App. B, 16a. By so holding, the District Court impermissibly weighed Petitioner's uncontested evidence[6] and ignored a body of law which holds that editorial decisions that are intentionally misleading and give rise to false and defamatory implications are actionable. Petitioner appealed the District Court's ruling to the Ninth Circuit Court of Appeals. There, in an unpublished memorandum, Circuit Judges Reinhardt, Tashima and Trott affirmed the District Court's decision. App. A, 1a-5a.

This matter is appropriate for review because the decision of the Ninth Circuit Court of Appeals conflicts with the established precedent of this Court initially set forth in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), as well as other Ninth Circuit decisions and decisions of the California Supreme Court. The failure of the Ninth Circuit to follow existing precedent not only prevented Petitioner from exercising his right to protect and defend his reputation, it improperly granted Respondents permission to defame with impunity. This Court has never held that the First Amendment permits a media defendant to intentionally and knowingly publish false

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[6] In order to preserve Plaintiff's right to a jury trial, "the Court's determination of the motion [under Cal. Code of Civ. Proc. § 425.16] cannot involve a weighing of the evidence." *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 823, 33 Cal. Rptr. 446, 454 (1994).

and defamatory implications without limitation. Instead, this Court has always recognized that the fair application of First Amendment doctrine leaves room for an individual to seek redress for intentional reputational harm.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant Review Because The Ninth Circuit's Interpretation Of The First Amendment And Application of the California Anti-SLAPP Statute Effectively Grants Immunity To The Press From Actions For Defamation By A Public Figure

This Court has never held that the First Amendment renders the media immune from liability for defamation of a public figure. To the contrary, as explained by this Court in *Curtis v. Butts*, 388 U.S. 130, 150 (1967), *quoting*, *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 132, 133 (1937), "A business 'is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."

And see, *Harte-Hanks*, 491 U.S. at 688, "We have not gone so far, however, as to accord the press absolute immunity in its coverage of public figures or elections. If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail."

In libel actions, this Court's decisions have been keenly focused on the accommodation of the

"competing considerations" of "preventing and redressing attacks upon reputation" and the need to protect the constitutional guarantee of freedom of the press. *Curtis*, 388 U.S. at 146, *quoting*, *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). As explained in *Curtis*, "the Court's primary concern has been to determine the extent of the [First Amendment] right and the surrounding safeguards necessary to give it 'breathing space.'" Id. at 148, *quoting*, *NAACP v. Button*, 371 U.S. 415, 433 (1963). *And see*, *Herbert v. Lando*, 441 U.S. 153, 169 (1979), "At the same time [as affirming First Amendment freedoms of the press] the Court has reiterated its conviction—reflected in the laws of defamation of all of the States—that the individual's interest in his reputation is also a basic concern."

As stated by this Court in *Curtis*, 388 U.S. at 152, in analyzing libel actions, the content of speech (i.e., falsity) is certainly a matter of substantial concern. "Thus, some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy."

However, a court's review of conduct provides a neutral ground upon which the resultant publication can be fairly judged.

> "It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. Impositions based on misconduct can be neutral with respect to content of the speech involved,

> free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood."

Id., 388 U.S. at 153.

In this case, the Ninth Circuit court of Appeals ignored substantial precedent by this Court, other decisions of the Ninth Circuit and the California Supreme Court establishing that the kind of conduct which occurred here is not protected by the First Amendment. Where, as here, Respondents intentionally ignored critical facts known to them before publication, used carefully chosen words and phrases to support their defamatory implications and misstated or misquoted sources to bolster their intentional misconduct, the First Amendment provides no cover. The Ninth Circuit erred because the record in this case establishes that the conduct of Respondents does not deserve constitutional protection.

B. This Court Should Grant Review Because The Ninth Circuit Decision In This Case Conflicts With Decisions Of This Court, Other Decisions Of The Ninth Circuit And Other Circuits Regarding The Liability Of The Press When Facts Known Before Publication Which Establish The Falsity Of Defamatory Statements Are Intentionally Omitted From A Publication

Even though Respondents' pre-publication investigation revealed that there was no factual basis to

doubt Petitioner's credibility, Respondents' intentionally ignored what they learned in order to portray Petitioner as a liar and a fraud. Respondents' purposeful avoidance of the truth has long been held to be sufficient to prevent a media defendant from relying on the First Amendment for protection.

In *Harte-Hanks*, 491 U.S. 657, this Court affirmed the appellate court's libel judgment against a newspaper, citing decisions made by the newspaper in investigating an article as evidence of it's "purposeful avoidance" of the truth. Regarding the newspaper's decision not to interview a key witness, this Court noted, "It is utterly bewildering in light of the fact that the Journal News committed substantial resources to investigating Thompson's claims, yet chose not to interview the one witness who was most likely to confirm Thompson's account of events." This Court reasoned that "a denial coming from [that witness] would quickly put an end to the story." The Court found that this conduct, combined with a decision not to listen to tapes that would have confirmed one witnesses' account of the facts, was evidence "that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [Thompson's charges]." *Id.* at 692 (emphasis added). This evidence of the *conduct* of the newspaper, was sufficient, by this Court's standards, to support a jury's finding that the newspaper had acted with constitutional malice by purposefully avoiding the truth. *Id.*[7]

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[7] While the case at bar was not dismissed specifically for failing to establish constitutional malice, the issue of Respondents' intent pervades the entire analysis. By establishing evidence of malicious

The Ninth Circuit followed the reasoning of *Harte-Hanks* in *Suzuki Motor Corp. v. Consumer Union of United States, Inc.*, 292 F. 3d 1192 (9th Cir. 2002) in a case in which a car manufacturer challenged a negative report published in *Consumer Reports* about one of its products, the Suzuki Samarai. Like *Harte-Hanks*, the Court of Appeals in *Suzuki Motor Corp.* found that there was evidence to establish that Defendants Consumer Union ("CU") "sought to produce a predetermined result in the Samurai test." *Id.* at 1202. Because CU failed to address Suzuki's claim that the published report on the Samurai was inaccurate because the testing procedures underlying the report were overly influenced by driver input, the Ninth Circuit reversed the District Court's finding of summary judgment for CU. Like *Harte-Hanks*, the important factor guiding the Court's decision in *Suzuki* was not so much the actual content of the report (i.e., that the Samarai was rated negatively), as the conduct of the publisher prior to the publication.

The case of *Murray v. Bailey*, 613 F. Supp. 1276 (N.D. Cal. 1985) pre-dates both *Harte Hanks* and *Suzuki*, but relied on the same principles. In *Murray*, the court denied summary judgment to Defendant F. Lee Bailey when he was accused by the Plaintiff of purposefully omitting facts known to him from his review of an arrest report involving Plaintiff. Although the Court agreed with Defendant Bailey, "that he had 'no duty to investigate beyond his review of the arrest report . . .'" the court held that Bailey's partial reliance could render him liable. Since Bailey had seen the

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intent to defame, Petitioner's assertion that the defamatory implications arise from the Article necessarily follows.

actual report, the Court distinguished cases involving a failure to investigate. Instead, the Court recognized that "None of the cases Bailey cites involves an instance where the alleged defamer had actually seen 'hard evidence' that rebutted his allegations." *Id.*, at 1285. On that basis, the Court denied Bailey's motion for summary judgment finding that such evidence "might well allow the jury to find by clear and convincing evidence that actual malice existed." *Id.*

These cases are controlling here because in this case Respondents intentionally disregarded evidence which was in their possession prior to publication that would have undermined their claim that Petitioner is a liar and a fraud. For instance, prior to publication, the Reporter interviewed Theodore Kraus, Ph.D. ("Kraus"), Petitioner's commanding officer in CIC. During the interview, Kraus showed the Reporter a letter, on CIC stationary, commending Petitioner's service in CIC as a Special Agent. Importantly, Kraus is one of the only remaining living witnesses to Petitioner's CIC service.

Despite this knowledge, the Article described Petitioner's statements about his service in CIC as if they were fabricated. After mentioning that the Pentagon was unable to verify his military service, the Article presents two possible explanations: First, is the possibility that a 1973 fire that destroyed "some" personnel files may have included his file; and second, that Petitioner was actually a civilian employee (i.e., he had lied about his service as a Special Agent). This "explanation" of possibilities is followed by a quote from Christopher Robbins, Petitioner's biographer, explaining that proof of Petitioner's Army credentials appear in "*Test of Courage*". In the next sentence, Robbins' statement is immediately and intentionally undermined by a statement of Conrad McCormick, "a CIC veteran

and archivist at the U.S. Army Intelligence Museum in Fort Huachuca, Ariz." who allegedly stated that the card pictured in the book isn't "the official ID issued to full-fledged CIC agents." App. C, 34a. Notably, the Article fails to mention Kraus, the Kraus interview and Kraus' unequivocal confirmation that Petitioner operated as a "full-fledged CIC Special Agent, not as a civilian employee, translator or investigator." All of this was presented to the district court in Kraus' sworn, and uncontested declaration.

A similar tact was taken by Respondents with regards to other evidence provided to them before publication. Declarations submitted by Petitioner in opposition to the Respondents' Motion pursuant to Cal. Code of Civ. Proc. § 425.16 establish that, prior to publication, the Reporter was also shown:

- A Recommendation For Decoration recommending Petitioner for the Silver Star;

- A letter of July 20, 1945 by Captain Rupert Guenthner praising Petitioner's service in CIC;

- A letter of November 5, 1945 by Ernest Gearheart, CIC Special Agent in Charge also praising Petitioner's "high caliber" work;

- A "Report of the French Forces of the Interior of December 4, 1944 signed by Captain Dax which describes Petitioner's heroic work in the French Secret Army and his arrest and capture by the Gestapo in Lyon;

- Numerous photographs and negatives of photographs taken by Petitioner at the liberation of Dachau depicting piles of stacked, emaciated corpses in

the crematorium, crematorium workers, and other gruesome scenes;

- Typed statements of four crematorium workers obtained at Dachau by Petitioner regarding what their Nazi captors forced them to do; and,

- A handwritten statement from Emil Mahl, the "Hangman of Dachau," personally taken by Petitioner upon his arrest of Mahl two days following the liberation of Dachau.

Like the facts learned during the Kraus interview, these documents were not even mentioned in the Article. While it is true that the Respondents are under no legal obligation to present their readers with every bit of evidence reviewed or obtained in the course of their investigation, it is also true that the editorial decisions made by Respondents are admissible to establish their intent. "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) *and see*, *Herbert v. Lando* ,441 U.S.153 (1979)(Finding no First Amendment impediment to discovery designed to reveal subjective editorial intent, including the editor's intentions "as manifested by his decision to include or exclude certain material.").

Like the defendants in *Harte-Hanks*, *Suzuki*, and *Murray*, Respondents' decision to ignore 'hard evidence' that rebutted their defamatory implications is admissible evidence of their intent and relevant to the question of First Amendment protection. The Ninth Circuit's failure to analyze and assess this conduct renders it's decision untenable.

C. This Court Should Grant Review Because The Ninth Circuit Court of Appeals Misapplied The Law Of The Circuit

The Court of Appeals' decision in this case further avoided the issue of Respondents' pre-publication conduct by holding that the publication is protected speech because the Article does not "challenge the principle claims made by Thomas, but rather permits the reader to draw his own conclusions regarding some of the relatively minor details." App. A, 3a. The Court of Appeals relied on *Partington v. Bugliosi*, 56 F. 3d 1147 (9th Cir. 1995) and *Chapin v. Knight-Ridder, Inc.*, 993 F. 2d. 1087, 1094 (4th Cir. 1993) in support of it's ruling. While *Partington* does stand for the proposition that "[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader to draw his own conclusions, those statements are generally protected by the First Amendment", it is not true in this case that the author has "outlined the facts available to him." 56 F. 3d at 1156-57. Indeed, it would be more accurate to say that the author in this case has stated only the weakest and least compelling evidence available to him regarding Petitioner's WWII military service and intentionally decided not to disclose the most powerful and compelling independent facts confirming his service. It is clear that if the Reporter had actually disclosed or outlined the facts available to him, as required by *Partington* and *Chapin*, he would have included Kraus' confirmation of Petitioner's service in CIC. Further, had the Reporter been desirous of writing an honest or balanced account he would have also referenced, or at least acknowledged, the letters of Ernest Gearheart Jr. and Rupert W. Guenthner, Petitioner's superior officers, both of whom praised

Petitioner for his outstanding service. Instead, the Reporter completely ignored Kraus' existence and the existence of documents confirming Petitioner's statements. Respondents' decision to exclude this information takes them outside of the protection provided by *Partington* and *Chapin* where such disclosures were critical. While the impetus for excluding such information is clear – if it was included, there would have been no story–the ramifications for such decisions are significant. *See*, *Harte-Hanks*, 491 U.S. at 682.

Petitioner is not claiming that the Reporter conducted a shoddy investigation, or that witnesses who should have been contacted were not. Indeed, Petitioner acknowledges that the Reporter's investigation was extremely thorough. At issue here is not what the reporter learned, because it is undisputed that he learned facts that would undermine his conclusion that Petitioner is a liar and a fraud. The issue here is what Respondents chose to print and ignore and why Respondents made those decisions. While generally the Ninth Circuit's holding that an article which "contains opinions from a variety of sources, need not contain all the favorable material supplied by the subject of the article" may be true, it is not applicable here. Petitioner does not complain because Respondents did not include "all the favorable material" he complains because they intentionally deprived readers of the most critical facts upon which they could draw their own conclusions. This conduct is not constitutionally protected. "'[W]hile the author's readers implicitly were invited to draw their own conclusions from the mixed information provided, the Milkovich readers implicitly were told that only one conclusion was possible." *Partington*, at 1157, *quoting*, *Phantom Touring, Inc. v. Affiliated Publications, et al.*,

953 F. 2d.724, 731 (1st Cir. 1992). As explained by Professor Robin T. Lakoff, Ph.D., a professor of linguistics and one of Petitioner's experts, "[S]ince the writer has departed from neutrality by setting forth a host of suggestions that depict Mr. Thomas as unreliable, the reader is invited, in fact virtually forced, to take sides against Mr. Thomas from early on, and the decision whom to believe is no longer free."

Accordingly, the Court of Appeals' erred by failing to analyze and evaluate Respondents' conduct and how that conduct impacted the content of the Article. The First Amendment does not protect a writer who purposefully avoids the truth. *Harte Hanks*, 491 U.S. at 693, *and see*, *Masson v. New Yorker Magazine, Inc.*, 960 F. 2d. 896, 901(9th Cir. 1992), "Thus where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place." Because the uncontested evidence in this case establishes that Respondents did not provide readers with the facts available to them, they should not be able to rely on the First Amendment to protect them from liability. Instead, like the holdings in *Harte-Hanks*, *Suzuki* and *Bailey*, this Court should hold Respondents accountable for their pre-publication conduct.

D. This Court Should Grant Review Because The Ninth Circuit Court Of Appeals Ruling Contravenes California Law

The Court of Appeals found dismissal of Petitioner's complaint to be appropriate because it ruled that the alleged defamatory implications did not arise from the Article. App. A. In the face of the evidence submitted by Petitioner to the District Court (and

presumably reviewed *de novo*), the Court of Appeals ruling applied a rule of interpretation that has long been rejected by the California Supreme Court, specifically, the "innocent interpretation" rule.

As applied, the "innocent interpretation" rule, provides an escape from liability for defamation if the statements at issue are "susceptible of an innocent interpretation." *MacLeod v. Tribune Publishing Co.*, 54 C. 2d 536, 547(1959). This rule was expressly rejected by the California Supreme Court in *MacLeod*. In that case, the court dismissed Defendant's argument that a claim of defamation by implication could not be libelous on its face and therefore required an allegation of special damages. The court held that "it is clear that language may be libelous on its face even though it may also be susceptible of an innocent interpretation." *Id.* at 549. In finding that the a rule permitting a defamer to avoid liability by merely presenting an innocent interpretation, "protects, not the innocent defamer whose words are libelous only because of facts unknown to him, but the clever writer versed in the law of defamatory imputation in ambiguous language . . ." the Court held:

> "The fact that an implied defamatory charge or insinuation leaves room for an innocent interpretation as well does not establish that the defamatory language does not appear from the language itself. The language used may give rise to conflicting inferences as the meaning intended, but when it is addressed to the public at large, it is reasonable to assume that at least some of the readers will take it in its defamatory sense."

Id. at 549. *And see, Forsher v. Bugliosi*, 26 Cal. 3d 792, 803 (1980), "This court's inquiry is not to determine if the communications have an innocent meaning but rather to determine if the communication reasonably carries with it a defamatory meaning."*And, Flowers v. Carville, et al.*, No. 00-17299, 2002 U.S. App. LEXIS 23371, *19 (9th Cir. Nov. 12, 2002) relying on Nevada law, "if a statement is susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury.'"

In this case, Petitioner submitted substantial evidence showing that readers did find the implication that Petitioner is a liar and a fraud to arise from the Article and that such a conclusion was reasonable. This evidence produced by Petitioner included sworn declarations from witnesses to the events discussed in the Article (the Kraus, Wimer, White and Thomas declarations) and sworn declarations from persons who read the Article and found that the alleged implications arose from the Article (the Robbins, Morris and Fournier declarations). Petitioner also submitted sworn declarations from two experts, a linguistics expert (the Lakoff declaration) and a journalism expert (the Mazingo declaration) establishing that the means and methods used by the Respondents were not random, that their conduct was below journalistic standards, and, that the words and phrases chosen by the Respondents were designed to force readers to the conclusion that Thomas is a liar and a fraud. <u>All of this evidence was uncontested</u>.

The California anti-SLAPP statute places an onerous burden on Plaintiffs in actions that arise "from any act . . . in furtherance of [a] person's right of petition or free speech." A Plaintiff is forced to produce evidence, before the start of discovery, to establish by

admissible evidence, "a probability that the plaintiff will prevail on the claim." Cal. Code of Civ. Proc. § 425.16(b)(1). In this case, Petitioner met his burden by presenting evidence that persuaded the district court that a reasonable reader "might conclude . . that Thomas had in fact lied about his past." App. B, 16a. Despite this, the Ninth Circuit ruled otherwise, finding that the defamatory implications did not exist. Under California law "it is error for a court to rule that a publication cannot be defamatory on its face when by any reasonable interpretation the language is susceptible of a defamatory meaning." *Selleck v. Globe International, Inc.*, 166 Cal. App. 3d 1123, 1131 (1985)(Emphasis added). *See also, Kaelin v. Globe Communications, Corp.*, 162 F. 3d 1036, 1040 (9th Cir. 1998) "So long as the publication is reasonably susceptible of a defamatory meaning, a factual question for the jury exists." The District Court's finding was summarily ignored by the Court of Appeals, despite overwhelming, undisputed evidence that Petitioner is not a liar or a fraud.

In light of this Court's continuing recognition of an individual's right to protect his reputation, Petitioner seeks review so that he may have an opportunity to prove his claim to a jury.

CONCLUSION

For the foregoing reasons, the petition should be granted and this case set for plenary consideration.

Respectfully submitted,

Anthony Michael Glassman
Counsel of Record
GLASSMAN, BROWNING & SALTSMAN, INC.
360 North Bedford Drive
Suite 204
Beverly Hills, CA 90210
(310) 278-5100
Attorneys for Petitioner Michel Thomas

APPENDIX A – Ninth Circuit Decision

No. 02-55343

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHEL THOMAS,
Plaintiff-Appellant,

v.

LOS ANGELES TIMES COMMUNICATIONS LLC, a Delaware limited liability company; ROY RIVENBURG, an individual; TRIBUNE COMPANY, a Delaware Corporation,
Defendants-Appellees.

August 6, 2002, Argued and Submitted,
Pasadena, California

September 6, 2002, Filed

COUNSEL:
For Michel Thomas, Plaintiff-Appellant: Anthony Michael Glassman, Esq., GLASSMAN & BROWNING, Beverly Hills, CA.

For LOS ANGELES TIMES COMMUNICATIONS LLC, ROY RIVENBURG, TRIBUNE COMPANY, Defendants-Appellees: Kelli L. Sager, Esq., DAVIS WRIGHT TREMAINE, Karlene W. Goller, Esq., Los Angeles Times Legal Department, Los Angeles, CA.

JUDGES:
Before: REINHARDT, TROTT and TASHIMA, Circuit Judges.

OPINION:

MEMORANDUM *

Before: REINHARDT, TROTT and TASHIMA, Circuit Judges.

Michel Thomas appeals the dismissal of his action for defamation against the Los Angeles Times and a Times reporter, Roy Rivenburg. The Times published an article, written by Rivenburg, about Thomas's remarkable life story. Thomas contends that the human-interest story, which was entitled "Larger Than Life," and was published on the first page of the Southern California Living section, gave rise to two defamatory implications: first, that he lied about some of his exploits during and following World War II, and second, that his language instruction program is a sham.

The district court granted the defendants' motion to strike the complaint pursuant to California's anti-SLAPP statute. Cal. Civ. P. Code § 425.16. n1 That statute provides that a defendant may make a special, expedited motion to strike in cases involving the defendant's rights to free speech or to petition for redress of grievances. In order to prevail against such a motion, a plaintiff must demonstrate, using admissible evidence, that he has a probability of success on the merits of the suit. Id. § 425.16(b)(1). We review the district court's ruling de novo, and affirm.

The district court correctly determined that Thomas was not likely to prevail on his claim that he was defamed by the Times article. Thomas alleges defamation by implication; accordingly, under our precedent he must prove not only that the article gives rise to a defamatory implication, but that the author "intended to convey the

defamatory implication." *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1064 (9th Cir. 1998). He fails to meet even his first burden; the article gives rise to neither of the alleged defamatory implications. n2 Moreover, even if he had met that burden, Thomas does not show that he has a probability of establishing that the author intended such defamatory implications.

As to the first allegedly defamatory implication, that Thomas lied about his past, it is true that the article sets forth conflicting factual accounts of historical events. It cannot, however, fairly be read as defamatory. The article does not accuse Thomas of intentionally misstating the truth, but instead contains the views of others that in some respects conflict with some of Thomas's public statements that were contained in his authorized biography. Moreover, the article does not challenge the principal claims made by Thomas, but rather permits the reader to draw his own conclusions regarding some of the relatively minor details. See *Partington v. Bugliosi*, 56 F.3d 1147, 1152 n.9 (9th Cir. 1995) (citing with approval *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4th Cir. 1993), which held that a publication offering alternative versions of facts does not give rise to a defamatory implication); see also *Chapin*, 993 F.2d at 1094 [I]nquiry itself, however embarrassing or unpleasant to its subject, is not accusation."); *Phantom Touring, Inc. v. Affiliated Publ'n.*, 953 F.2d 724, 731 (1st Cir. 1992) (holding that no defamatory implication existed because "the author's readers implicitly were invited to draw their own conclusions from the mixed information provided").

Further, as the district court correctly held, Thomas is a limited-purpose public figure for the purpose of defamation analysis, because by authorizing a biography and soliciting press coverage of that work, Thomas

"invited attention and comment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974). The validity of Thomas's admittedly extraordinary claims regarding his World War II-era exploits are thus particularly appropriate material for close examination and fair comment by the press. Such an analysis, if it contains opinions from a variety of sources, need not contain all the favorable material supplied by the subject of the article. Again, it is significant that the challenged article makes it plain that the reader should draw his own conclusions.

With respect to the second allegedly defamatory implication, that his language instruction program is bogus, Thomas shows even less likelihood of prevailing on the merits. Indeed, to the extent that the article discusses the language program at all, it primarily contains testimonials praising the efficacy of his teaching methods. It cites several of his celebrity clients and two prominent educators, all of whom speak in glowing terms about Thomas and his methods of instruction. The article notes that nobody else can replicate Thomas's instruction techniques, but cannot reasonably be read to suggest that Thomas's language school is a fraud.

The district court was thus correct to grant defendant's anti-SLAPP motion to strike Thomas's complaint.

AFFIRMED.

Footnotes:

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

n1 The defendants removed this case from California Superior Court on the basis of diversity jurisdiction. Accordingly, California procedural rules apply to the extent that they do not conflict with the Federal Rules of Civil Procedure. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50, 64 L. Ed. 2d 659, 100 S. Ct. 1978 (1980). We have previously held that the special motion to strike provided for by the anti-SLAPP statute may be made in cases removed from the California courts. U.S. ex rel. *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 968 (9th Cir. 1999). Thomas does not contest the applicability of the anti-SLAPP statute to this action.

n2 A number of jurisdictions have held that public figures cannot bring defamation-by-implication claims. See, e.g., *Fitzgerald v. Tucker*, 737 So. 2d 706, 717 (La. 1999); *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 477 A.2d 1005, 1010 (Conn. 1984). We need not decide whether, under California law, defamation-by-implication claims can be brought by public figures, because even if they can be, Thomas, who does not dispute his status as a public figure, has failed to meet his burden of proof.

APPENDIX B – District Court Decision

CASE NO.: CV 01-8684 ABC (MANx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MICHEL THOMAS,
Plaintiff,

v.

LOS ANGELES TIMES COMMUNICATIONS, LLC, et al.,
Defendants.

February 4, 2002, Decided

February 4, 2002, Filed; February 5, 2002, Entered

COUNSEL:
For MICHEL THOMAS, plaintiff: Anthony M Glassman, Eve F Sheedy, Glassman Browning & Saltsman, Beverly Hills, CA.

For L A TIMES COMMUNICATIONS LLC, ROY RIVEN BURG, TRIBUNE COMPANY, defendants: Kelli L Sager, Alonzo B Wickers, IV, Jean-Paul Jassy, Davis Wright Tremaine, Karlene Worthington Goller, Los Angeles Times, Los Angeles, CA.

JUDGES:
AUDREY B. COLLINS, UNITED STATES DISTRICT JUDGE.

OPINION BY:
AUDREY B. COLLINS

OPINION:
ORDER RE: DEFENDANTS' SPECIAL MOTION TO STRIKE PURSUANT TO CAL. CIV. PRO. CODE § 425.16; DEFENDANTS' REQUEST FOR ATTORNEYS' FEES AND COSTS PURSUANT TO CAL. CIV. PRO. § 425.16(c).

This case arises from an article appearing in the Los Angeles Times after the publication of a biography about the life of Plaintiff Michel Thomas. Currently pending before the Court is Defendants' Special Motion to Strike the Complaint pursuant to California Code of Civil Procedure § 425.16. The Motion came on regularly for hearing before the Court on February 4, 2002. After consideration of the submissions of the parties and the case file, as well as the oral argument of counsel, the Court STRIKES Plaintiff's Complaint.

I. FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

Plaintiff Michel Thomas alleges that he is a concentration camp survivor, a member of the French Resistance, a World War II veteran, and an agent of the United States Army Counter Intelligence Corps ("CIC") during World War II. Complaint P 4. Thomas further alleges that, as part of his service with the CIC, he was present at the liberation of Dauchau, where he interrogated members of the crematorium staff; he personally obtained a letter of confession from Emil Mahl (the "Hangman of Dachau"); he was the first official of the Allied forces to discover the existence of Nazi documents in a paper mill near Munich, Germany; and he captured SS Major Knittel, a priority war criminal. See id. Thomas next alleges that, while he was a member of the French Resistance, he was interrogated by and escaped from Klaus Barbie, a Nazi Gestapo

officer. See id. P 5. Thomas currently owns and operates Michel Thomas Language Centers, schools that teach foreign language and English as a second language in New York City and Beverly Hills, California. See id. P 6.

Thomas is the subject of a biography, Test of Courage: The Michel Thomas Story, authored by Christopher Robbins and published in the year 2000 by Free Press/Simon & Schuster. See Motion Ex. A. Robbins and Thomas are splitting the royalties from the biography. See Complaint Ex. A. On April 15, 2001, Defendant Los Angeles Times published an article about Thomas, titled "Larger Than Life" and authored by Defendant Roy Rivenburg, a staff writer. See id. P 9 & Ex. A. The article, based on interviews with Thomas and others, addresses Thomas' claims that he was at the liberation of Dauchau as an American Army officer, that he found the Nazi documents, and that he has developed revolutionary teaching methods. See id.

On October 9, 2001, Thomas filed the instant lawsuit against Defendants, alleging that the April 15, 2001, article was defamatory. Specifically, he contends that the article contains six false and defamatory implications: (1) "that Thomas was not a member of and did not serve with the United States Counter Intelligence Corps ("CIC") during World War II;" (2) "that Thomas was not present at the liberation of Dachau;" (3) "that Thomas was not interrogated by and did not escape from Klaus Barbie, and that this testimony to that effect during Barbie's war crimes trial must therefore have been fabricated;" (4) "that Thomas did not discover and secure a vast amount of Nazi government documents and Nazi Party membership cards;" (5) that Thomas has lied about, fabricated, and exaggerated events of his past;" and (6) that Thomas' language teaching method is a sham and that the classes

he offers are not worth the fee charged." Id. P 10. He claims that the alleged defamatory implications were achieved through the use of linguistic devices and slanted words and phrases and the exclusion of numerous facts and documents. See id. PP 12-14.

On December 4, 2001, Defendants filed this Special Motion to Strike the Complaint pursuant to California Code of Civil Procedure § 425.16, noticed for hearing on February 4, 2002. Plaintiff filed his Opposition on January 14, 2002. Defendants filed a Reply on January 28, 2002.

II. STANDARD FOR MOTION TO STRIKE

California Code of Civil Procedure § 425.16, commonly referred to as the "Anti-SLAPP" n1 statute, was enacted in 1993 "in response to the legislature's concern about civil actions aimed at private citizens to deter or punish them for exercising their political or legal rights." *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970 (9th Cir. 1999) (citing *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (1994)). "The hallmark of a SLAPP suit is that it lacks merit, and is brought with the goal[] of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party's case will be weakened or abandoned . . . ." Id.

To combat the perceived threat of lawsuits filed merely to deter the exercise of political or legal rights, Section 425.16 sets up a "special motion to strike," that is akin to a Rule 12(b)(6) motion to dismiss. The Ninth Circuit has determined that the procedure set up by Section 425.16 applies to state law claims filed in federal court. See 190 F.3d at 972-73 (applying Section 425.16 to state-law counterclaims).

"In order to prevail, a citizen party must make a prima facie showing that the SLAPP suit arises from any act by the citizen party 'in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue.'" Id. at 971. The Court makes this determination from the pleadings and supporting or opposing affidavits. Once this prima facie showing is made, the burden then shifts to the plaintiff to establish by a "reasonable probability" that he or she will prevail on the claim and that the defendant's "purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses." See id. (quoting *Wilcox*, 27 Cal. App. 4th at 824-25). The prevailing party on a special motion to strike is entitled to his or her attorney's fees and costs. See id. (citing Section 425.16(c)).

III. DISCUSSION

A. Motion to Strike Pursuant to Code of Civil Procedure § 425.16

It is Defendants' initial burden to show that the claims in this case arose out of conduct "in furtherance of . . . free speech under the Constitution . . . in connection with a public issue." Cal. Civ. Pro. Code § 425.16(b); *Newsham*, 190 F.3d at 971. Plaintiff concedes that the anti-SLAPP statute applies to this action. See Opposition at 7:7-18. Accordingly, Defendants' burden to show this connection being met, it falls to Plaintiff to establish a "probability that [he] will prevail on the claim." Cal. Civ. Pro. Code § 425.16(b); *Newsham*, 190 F.3d at 971.

Defendants make three arguments in favor of their Motion to Strike: (1) that Thomas cannot prevail on a

defamation by implication claim because he is a public figure; (2) that the article cannot reasonably be interpreted as giving rise to any of the defamatory implications identified in the Complaint; and (3) that the article is constitutionally protected.

1. Is Thomas a public figure?

The first issue for the Court, because it affects the appropriate legal standard, is whether Thomas is a public figure. Public figures must prove by clear and convincing evidence that an allegedly defamatory statement was made with knowledge of its falsity or in reckless disregard of its truth or falsity (known as "actual malice"). See *New York Times Co. v. Sullivan*, 376 U.S. 254, 296, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974). "'Public figures are less deserving of protection than private persons because public figures . . . have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.'" *Copp v. Paxton*, 45 Cal. App. 4th 829, 845 (1996) (quoting *Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 253, 208 Cal. Rptr. 137, 690 P.2d 610 (1984)) (internal quotation marks omitted). The question of whether a plaintiff is a public figure is a question for the Court, rather than the jury. See id. (quoting *Denney v. Lawrence*, 22 Cal. App. 4th 927, 933 (1994)).

Limited purpose public figures "lose some protection regarding their reputation 'to the extent that the allegedly defamatory communication relates to [their] role in a public controversy.'" *Rudnick v. McMillan*, 25 Cal. App. 4th 1183, 1190 (1994) (quoting *Reader's Digest*, 37 Cal. 3d at 253-54). "To qualify as a limited purpose public figure, a plaintiff 'must have undertaken some

voluntary [affirmative] action through which he seeks to influence the resolution of the public issues involved.'" Id. (quoting *Reader's Digest*, 37 Cal. 3d at 254) (alterations and emphasis in *Rudnick*).

The Complaint itself certainly supports a finding that Thomas is a public figure. Cf. *Nadel v. Regents of the Univ. of Calif.*, 28 Cal. App. 4th 1251, 1270 (1994) ("By Nadel's own account, [the public figure] characterization would certainly apply to him."). Thomas alleges that he has addressed the Anti-Defamation League and the Leo Baeck Institute in New York, that he has been interviewed on ABC's "Nightline" program in connection with his testimony in the Barbie trial, that he has been repeatedly quoted in the New York Times as a concentration camp survivor and CIC agent, and that he was profiled in a 1983 Los Angeles Times article that identified him as a CIC agent and Holocaust survivor. See Complaint P 26. The Court finds that Plaintiff has acknowledged that he has thrust himself into the public controversy over disputed questions remaining from World War II.

Thomas has additionally been featured in numerous articles about his program for teaching foreign languages. See Motion Ex. E. These articles reveal a public controversy over the validity and effectiveness of Thomas' teaching methods. n2

Perhaps most importantly, Thomas cooperated with Robbins in the publication of his biography, Test of Courage. See Motion Ex. A at x-xi. "Generally, authors are considered to have participated sufficiently in public controversies or otherwise involved themselves in matters of public concern as to be public figures." *Live Oak Publishing, Inc. v. Cohagan*, 234 Cal. App. 3d 1277, 1289, 286 Cal. Rptr. 198 (1991) (internal quotation

omitted). Although Thomas was not himself the author of the book, the Court finds that his cooperation with its publication subjects him to becoming a public figure. The book addresses Thomas' alleged World War II activities and language teaching methods. See id. at ix-xi. By cooperating with the publication of the book, Thomas has invited public attention - and public scrutiny - to his life. n3 Compare Motion Exs. F & G (inviting Defendant Rivenburg to interview Thomas about the book) with *Rudnick*, 25 Cal. App. 4th at 1190-91 (finding that the plaintiff had "made himself into a limited purpose public figure" by inviting reporters to visit his ranch and write stories about him); *Denney v. Lawrence*, 22 Cal. App. 4th 927, 935-36 (1994) (finding that the plaintiff was a public figure because he had volunteered to give press interviews and promoted his own version of the events surrounding his sister-in-law's murder). Accordingly, at least with respect to his World War II participation and his teaching methods, the Court finds that Thomas is a public figure. As a limited purpose public figure, he must show "actual malice" to prevail on a defamation claim.

2. As a public figure, can Thomas state a defamation by implication claim?

Defendants next argue that, as a public figure, Thomas cannot prevail on his defamation claim because it is based only on implications, not statements of facts. See *Fitzgerald v. Tucker*, 737 So. 2d 706, 717 (La. 1999); *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 477 A.2d 1005, 1010 (Conn. 1984); *Pietrafeso v. D.P.I., Inc.*, 757 P.2d 1113, 1116 (Colo. Ct. App. 1988); *De Falco v. Anderson*, 209 N.J. Super. 99, 506 A.2d 1280, 1284 (N.J. Ct. App. 1986); *Mihalik v. Duprey*, 11 Mass. App. Ct. 602, 417 N.E.2d 1238, 1241 (Mass. Ct. App. 1981). These decisions have held that the rule that public

figures cannot state a claim for defamation by implication "is a corollary to the privilege accorded false statements concerning public officials [or public figures] without malice." *Strada*, 477 A.2d at 1012.

However, neither the California courts nor the Ninth Circuit have ever held that a public figure cannot state a claim by defamation for implication. See, e.g., *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 343 P.2d 36 (1959) (applying actual malice standard to claim that report implied that the plaintiff was a Communist sympathizer); *Partington v. Bugliosi*, 56 F.3d 1147, 1152 (9th Cir. 1995) ("we do not determine whether the fact that Partington's claim regarding passages in the book rests upon the implication arising from the statements, rather than their actual content, would affect the showing that Partington is required to make"). The Court declines to do so here, in the absence of controlling authority, and concludes that Thomas' status as a public figure is not a per se bar to his defamation by implication claim. Nevertheless, the Court is mindful of the "leeway for criticism" of public figures, including for "implications depracatory to plaintiff . . . ." *Okun v. Superior Court*, 29 Cal. 3d 442, 450, 175 Cal. Rptr. 157, 629 P.2d 1369 (1981).

3. Has Thomas shown a probability that he will prevail?

"To constitute a libel it is not necessary that there be a direct and specific allegation of improper conduct . . . . The charge may be either expressly stated or implied . . . ." *MacLeod*, 52 Cal. 2d at 548-49 (internal quotation marks and citation omitted). When addressing a defamation by implication claim, the Court "must determine whether the statements that form the basis of a defamation claim: (1) . . . impliedly assert a fact that is susceptible to being proved false; and (2) whether the

language and tenor is such that it cannot 'reasonably be interpreted as stating actual facts.'" *Weller v. American Broadcasting Cos., Inc.*, 232 Cal. App. 3d 991, 1001, 283 Cal. Rptr. 644 (1991) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 111 L. Ed. 2d 1, 110 S. Ct. 2695 (1990)) (alteration omitted).

Defendants first contend that the article cannot reasonably be read as giving rise to the allegedly defamatory implications identified by Plaintiff. Thomas "must show that the words [Rivenburg wrote] were reasonably capable of sustaining [the alleged defamatory] meaning. More important, he must show that a jury could reasonably find by clear and convincing evidence that [Defendants] 'intended to convey the defamatory impression.'" *Dodds v. American Broadcasting Co., Inc.*, 145 F.3d 1053, 1063-64 (9th Cir. 1998) (quoting *Newton v. National Broadcasting Co.*, Inc., 930 F.2d 662, 681 (9th Cir. 1990)). "This court's inquiry is not to determine if the communications may have an innocent meaning but rather to determine if the communication reasonably carries with it a defamatory meaning." *Forsher v. Bugliosi*, 26 Cal. 3d 792, 803, 163 Cal. Rptr. 628, 608 P.2d 716 (1980).

The Court agrees with Defendants that the allegation that the article implies that Thomas has lied about his past subsumes the allegations that the article implies that he was not a member of the CIC, was not present at the liberation of Dachau, did not escape from Klaus Barbie, and did not discover a cache of Nazi documents. There is nothing defamatory about the alleged implications that he was not active in World War II unless accompanied by an implication that he had lied about those activities. The Court assumes, arguendo, that implications that Thomas has lied about his past and that his language classes are "a sham" would be

defamatory.

A reasonable reader or juror might conclude, after reading the article and considering the various points of view presented, that Thomas had in fact lied about his past. But no reasonable juror could find that Defendants intended to convey that impression. At most, a reasonable juror would find that Defendants intended to raise questions about Thomas' story. n4 Cf. *Okun v. Superior Court*, 29 Cal. 3d 442, 452, 175 Cal. Rptr. 157, 629 P.2d 1369 (1981) ("The letter's apparent aim . . . was to disclose whatever pertinent facts were known to the writer.").

The article raises these questions by setting forth Plaintiff's version of events along with those of other witnesses and historical records. n5 With regard to the alleged implication that Thomas did not serve with the CIC, the article states that the Pentagon was unable to verify Thomas' military service, but explains that a 1973 fire destroyed some personnel filed. See Complaint Ex. A. The article also raises the possibility with Thomas served with the CIC as a civilian employee. See id. As a civilian employee could be considered to have been a "member" of or "served with" the CIC, the Court finds that Rivenburg did not intend to convey an implication that Thomas lied about his military service. With regard to the alleged implication that Thomas was not present at the liberation of Dachau, the article merely compares Thomas' account with other eyewitness reports. See id. The article attributes to Robbins, not Thomas, the confusion over which unit Thomas was with. See id. With regard to whether Thomas was interrogated by and escaped from Klaus Barbie, the article merely reports multiple accounts of Thomas' testimony. See id. Lastly, with regard to the alleged implication that Thomas did not discover a cache of Nazi documents, the article

states that another individual was given credit for the discovery in a 1945 press conference, but quotes Robbins as saying that he has seen the documents that Thomas discovered. See id. Although the article does suggest that Rivenburg is skeptical about Thomas' life story, it does not conclude definitively either that Thomas has told the truth or lied. It would be clear to a reader that the skepticism is Rivenburg's own opinion and is based on the facts presented. Cf. *Partington*, 56 F.3d at 1156-57 ("When an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment."). n6

For similar reasons, the article cannot be read to suggest that Defendants intended to imply that Thomas' language classes are a sham. The article raises questions about the validity of Thomas' teaching methods and leaves the reader free to draw his own conclusion. n7 For example, the article quotes both individuals who have seen Thomas' teaching method succeed and fail. See Complaint Ex. A. n8 For the foregoing reasons, Plaintiff's claim must be stricken because he has not shown that he has a probability of proving that Defendants intended to convey a defamatory impression.

More significantly, the Court also finds that even if Defendants did intend to assert the allegedly defamatory implications, the article itself is constitutionally protected because it merely states "opinions on matters of public concern that do not constitute or imply a provable factual assertion." *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 111 L.

Ed. 2d 1, 110 S. Ct. 2695 (1990)). The Court applies a three-step analysis to determine whether the article implies a provable factual assertion:

First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Id. (citing *Partington*, 56 F.3d at 1153). n9 Throughout this analysis, the Court finds the Ninth Circuit's decision in *Partington* to be particularly helpful. There, the court cautioned that "the First Amendment guarantees authors 'the interpretive license that is necessary when relying upon ambiguous sources.'" *Partington*, 56 F.3d at 1154 (quoting *Masson v. New York Magazine*, 501 U.S. 496, 519, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991)). In *Partington*, as well as this case,

[the author] can only be said to have expressed his own opinion after having outlined all of the facts that serve as the basis for his conclusion . . . . "Because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation."

Id. at 1156 (quoting *Moldea v. New York Times Co.*, 1, 22 F.3d 310, 317 (D.C. Cir. 1994)).

a. The broad context of the article

First, the broad context of the work supports a finding

of constitutional protection. Although there is no per se protection for book reviews, "when a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation." *Moldea*, 22 F.3d at 313. Rivenburg's article refers repeatedly to Robbins' biography of Thomas, but the Court cannot find that the article is truly a book review. The article is not critical so much of Robbins' research and writing as the underlying story itself. Nevertheless, the Court finds that the article is "a rational assessment or account of something the reviewer can point to in the text, or omitted from the text." Id. at 315 (emphasis in original). That is, the article is Rivenburg's account of historical research omitted from the text. Accordingly, the article is deserving of protection similar to that accorded a book review.

Additionally, the article is not the type of "apparently objective and neutral reporting . . . almost certain to be understood as factual." *Weller*, 232 Cal. App. 3d at 1004. The article appeared in the feature section of the Los Angeles Times and is written in an almost conversational tone. It would be obvious to the average reader that the article is intended to be commentary, rather than a hard-hitting investigative report (as was the case in Weller).

Finally, the article explicitly states that its purpose is to "compare[] several of Thomas' accounts of his role in historic events with other records and recollections." Complaint Ex. A. The Court agrees with the Fourth Circuit that:

"the mere raising of questions is, without more, insufficient to sustain a defamation suit in these

circumstances. Questions are not necessarily accusations or affronts. Nor do they necessarily insinuate derogatory answers. They may simply be, as they are here, expressions of uncertainty. The . . . article advances alternative answers to the questions it raises . . . ."

Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1098 (4th Cir. 1993) (quoting *Chapin v. Greve*, 787 F. Supp. 557, 567-58 (E.D. Va. 1992)). Even if Rivenburg's opinion is that Thomas lied and that opinion comes through in the article, that opinion is clearly based on a consideration of both sides of the story. If the opinion is based on disclosed facts, it is not actionable. See *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1123 (C.D. Cal. 1998) ("Because the factual referent is disclosed, 'readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts.'") (quoting *Standing Comm'ee v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995)), aff'd 210 F.3d 1036 (9th Cir. 2000).

b. The specific context of the article

Second, the specific context of the article also supports a finding that the article is constitutionally protected. Plaintiff takes issue with certain linguistic and rhetorical devices used in the article. See Complaint P 4. These "slanted words," "personal ridicule," and use of "irony," however, all take the article out of the realm of fact. n10 "The language [is] colorful, figurative rhetoric that reasonable minds would not take to be factual." *Underwager*, 69 F.3d at 367. Rivenburg's language, such as "wild tales" and "sporting a pompadour of unknown origin," is virtually indistinguishable from the colorful phrasing approved in *Underwager*. See id. (approving

use of the phrases "looking at greener pastures" and "must have trouble sleeping"). Rivenburg's "stylistic clash" and "tongue-in-cheek commentary," Complaint P 12, create the conversational style that makes clear that the article is protected opinion. See *Partington*, 56 F.3d at 1157 ("The First Amendment protects the 'rhetorical hyperbole' and 'imaginative expression' that enlivens writers' prose.") (quoting *Milkovich*, 497 U.S. at 20).

C. Whether the implications are provably false

Third, as to the question of whether the implications are provably false, the article reveals that there is conflicting information on each of the implications. Cf. *Partington*, 56 F.3d at 1154 ("There is no question that the subject matter of the book, and the sources upon which Bugliosi relies in drawing his conclusions, are inherently ambiguous, and we believe that reasonable minds could differ as to how to interpret the events and actions described in it."). The Court recognizes that the historical record can be inherently ambiguous. Additionally, the alleged implications are the types of statements that courts have repeatedly found not to be provably false. See, e.g., *Underwager*, 69 F.3d at 367 (finding that an accusation that the plaintiff lied is not defamatory because "the term 'lying' applies to a spectrum of untruths including 'white lies,' 'partial truths,' 'misinterpretation,' and 'deception'"); *Dodds*, 145 F.3d at 1066 (finding that questions of value are "largely subjective"); *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 249 (1st Cir. 2000) (finding that "subjective characterizations of what happened" are protected). For these reasons, the Court finds that no statements in the article are provably false.

In sum, by cooperating in the publication of his

biography, Thomas "'invited attention and comment . . . . It was . . . properly an invitation to investigate and question. That's all [Rivenburg] did.'" *Chapin*, 993 F.2d at 1098 (quoting *Chapin*, 787 F. Supp. at 567-68). Therefore, the Court finds that Plaintiff has not shown a probability of success on his defamation claims and the Complaint must be struck under Section 425.16.

Finally, because the allegedly defamatory implications are not actionable, there is no need for the Court to consider whether Plaintiff has made a showing of actual malice. Nevertheless, the Court observes that "any failures or omissions in [Rivenburg's] conduct . . . fell far short of that required to establish that [he] acted with reckless disregard for the truth." *Dodds v. American Broadcasting Co., Inc.*, 145 F.3d 1053, 1063 (9th Cir. 1998). Even if Rivenburg "could have done a more thorough and responsible job in general in determining the facts . . .[,] that . . . is not the test for determining whether the network acted with actual malice . . . ." Id.

B. Attorneys' Fees and Costs Under Section 425.16(c)

The attorneys' fees provision of Section 425.16 also applies in federal court, and declares that an award of attorneys' fees to a moving party is mandatory if a special motion to strike is granted. See Cal. Civ. Pro. Code § 425.16(c) ("a prevailing party [ordinarily a defendant, but plaintiff in this case] on a special motion to strike shall be entitled to recover his or her attorneys' fees and costs") (emphasis added). Defendants are the "prevailing party."

Defendants have not yet filed a Motion for Attorneys' Fees incurred in moving to strike the state law counterclaims. See Notice of Motion at 5 n.8. Defendants may timely file such a motion pursuant to

the authority of Section 425.16(c) and Local Rule 54-12.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motion to Strike the Complaint. n11 The Court also declares Defendants to be the "prevailing party" pursuant to California Code of Civil Procedure § 425.16 and thereby to be entitled to fees and costs incurred in striking the non-meritorious Complaint.

DATED: Feb. 4, 2000
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

Footnotes:

n1 "SLAPP" stands for "Strategic Lawsuit Against Public Participation."

n2 In *Vegod Corp. v. American Broadcasting Cos., Inc.*, 25 Cal. 3d 763, 770, 160 Cal. Rptr. 97, 603 P.2d 14 (1979), the California Supreme Court held that "a person in the business world advertising his wares does not necessarily become part of an existing public controversy." However, Thomas has gone beyond merely "advertising his wares." Rather, he is portrayed, and has portrayed himself, in numerous interviews as an expert in the field of language education. See Motion Ex. E. Accordingly, *Vegod* is inapposite.

n3 The California Supreme Court's decision in *Khawar v. Globe Int'l, Inc.*, 19 Cal. 4th 254, 965 P.2d 696 (1998), is distinguishable. Unlike Thomas, the plaintiff in *Khawar* "did not engage in conduct that was calculated to draw attention to himself . . . ." Id. at 267 (internal

quotation marks omitted).

n4 At oral argument, Plaintiff's counsel raised the question of whether the Court had impermissibly weighed the evidence presented in reaching this conclusion. The Court has not weighed the evidence, but rather reaches this conclusion as a matter of law.

n5 The Court therefore concludes that Weller is distinguishable. There, the court stated that "appellants' characterization of the series of broadcasts as consistently and accurately presenting both sides of the story . . . is not supported by the record." 232 Cal. App. 3d at 1004 n.11. The Court finds that Rivenburg did present both sides of Thomas' stories and left room for the reader to form his own opinion.

n6 At oral argument, Plaintiff's counsel detailed for the Court the evidence supporting Plaintiff's story that was available to Rivenburg but was not included in the article. No case has ever held that an author is required to include all the information uncovered in his research. In fact, given the space limitations of a newspaper, it is unlikely that any article could include all of the author's research. And it is not the Court's role to serve as the editor of the article, determining what additional information should or should not have been included.

n7 The declarations submitted by Thomas do not dissuade the Court. See Decl. of Christopher Robbins at PP 4-8; Decl. of Michel Thomas at PP 63-71; Decl. of Herbert Morris at PP 3-7. These declarations merely reveal a reporter doing his job - asking tough questions. See Thomas Decl. P 66 ("Rivenburg would insist that I provide ever-finer levels of detail."). In fact, Professor Morris has declared that, in his interview with Defendant Rivenburg, "it became clear to me . . . that the forthcoming Article would be skeptical in character and that it would in all likelihood call into question the

truthfulness of a number of Michel Thomas' claims about his World War II experiences." Morris Decl. P 3. There is nothing impermissible about Rivenburg's alleged intention to raise questions about Thomas' story.

n8 The Court also finds that no reasonable juror could conclude from reading the article that the language classes are a sham. Rivenburg apparently has not experienced the classes, and the article has a much less skeptical tone.

n9 The Court finds the declarations submitted by Plaintiff to be unhelpful. "The publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained ~~in the~~ law, but by the natural and probable effect upon the mind of the average reader." *MacLeod v. Tribune Publishing Co.*, 52 Cal. 2d 536, 547, 343 P.2d 36 (1959). Plaintiff's expert declarants may not be trained in the law, but neither should they be considered "average readers."

n10 At this stage, the Court cannot resolve Plaintiff's allegation that Rivenburg relied on "fabricated and/or out of context quotations." Complaint P 12. But the Court is inclined to conclude that Plaintiff's allegations show, at most, that the alleged implications are not necessarily provable.

n11 The Court agrees with Defendants that Plaintiff may not amend his Complaint after it is stricken pursuant to California Code of Civil Procedure § 425.16. See *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073-74 (2001).

APPENDIX C - Article

Sunday, April 15, 2001
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Larger Than Life

From escaping concentration camps to cavorting with royalty to plotting an education revolution, Michel Thomas has had one adventure after another. Even he knows his life story invites skepticism.

By: ROY RIVENBURG
Times Staff Writer

If everything he says is true, Michel Thomas has led an astonishing, even miraculous, life. Dressed in a navy blue suit and sporting a silver pompadour of unknown origin, he opens a battered briefcase and removes a stack of old photos and documents as he recounts various exploits:

He was the sole survivor of not one but three concentration camps in World War II; he talked his way out of being executed by Gestapo chieftain Klaus Barbie; he helped liberate Dachau; he rescued 40 tons of Nazi dossiers on the verge of destruction in Munich; he hobnobbed with princes and seduced starlets; he dropped acid in 1958 as part of a pioneering drug experiment; he beat the slot machines in Monaco.

Oh, and his New York and Beverly Hills language schools can teach anyone a foreign tongue in just three days.

Could one man really have done so much? Judging from several decades of glowing media coverage, a flood of celebrity endorsements and a new book by a British journalist, yes.

"Everything is fully documented," Thomas says. "Don't take my word for it. Ask me how I can prove it."

Easier said than done.

On this day, the 87-year-old language guru is holding court inside a suite at the Luxe Summit Hotel Bel-Air. The visit is part of an international publicity blitz for his $18,000 classes, his language CDs and "Test of Courage: The Michel Thomas Story" (Free Press/Simon & Schuster), a biography by Christopher Robbins.

A short, rounded man who speaks with fiery intensity, Thomas readily admits his stories are hard to believe. When a UCLA law professor first heard the saga, he said: "Michel, either more miracles are associated with your life than anyone I could possibly imagine, or you're the biggest fraud who ever walked the face of the earth." But after taking Thomas' Spanish class, the professor, Herb Morris, became a believer.

"I expect people to be skeptical," Thomas says.

Many of his claims are impossible to prove--or disprove. Nevertheless, they have frequently propelled him into the public eye--most notably at the 1987 trial of Gestapo leader Barbie, where Thomas' controversial testimony was disparaged by some but supported by well-known Nazi hunter Serge Klarsfeld and the Simon Wiesenthal Center.

In the Los Angeles Times, 10 articles about different

aspects of his life have appeared since 1965, when he volunteered his services to inner-city youth and won raves for succeeding where traditional teachers failed.

More recently, he has been profiled in a BBC documentary, Forbes magazine, USA Today, the New York Post, a spate of British newspapers and on CNN. Last November, his biography briefly cracked L.A. bestseller lists, boosted by dust jacket blurbs from actress Emma Thompson and author John Le Carre, who calls Thomas "one of the bravest men you will ever read about." Michael Ovitz's talent agency is peddling the movie rights.

Told in often melodramatic tones, the book follows Thomas from his childhood in a prosperous Jewish household in Poland to Germany and later to wartime France, where he joined the Resistance, interrogated Nazis for the U.S. Army and slept with a bevy of women ("As we were making love . . . an American artillery position opened fire right above us in the hills. The ground moved"). In 1947, he came to L.A. and opened his language school on Rodeo Drive.

Some big names swear by his classes.

Woody Allen told the BBC that when Thomas offered to teach him French over a weekend in 1972, he figured: "Why not? Either the guy's crazy and I lose a couple hundred bucks or it's some kind of miracle. So I gave it a try, and he was amazing." Other celebrity clients include the duchess of York, Mel Gibson, Carl Reiner, Armand Hammer and Ann-Margret.

Thomas, who teaches six languages, doesn't promise students enough fluency to understand a foreign film. But he does guarantee a basic command of words and

grammar--all without memorization or note-taking. Yet nobody on his staff can duplicate the feat. Their lessons--at one-third the price--take about eight days. That time-frame is comparable to other intensive language programs, such as Berlitz or Dartmouth's Rassias seminar.

What's Thomas' secret?

He somehow instills enormous self-confidence, says UCLA's Morris. "You enter another world. It's not a trance. It's more like learning from a Buddhist master. When people are in the master's presence, something happens to them."

Jackie Kearns, principal of a British school experimenting with the program, offers a more down-to-earth explanation. Thomas borrowed a method from the past and brilliantly repackaged it, she says. With French, for instance, he begins by explaining how thousands of words--regret, comfortable, opinion, etc.--are the same in both languages. "English is French, badly pronounced," he intones.

Right away, the student feels mastery of a previously alien tongue, Kearns says. From there, Thomas ingrains pronunciation and grammar.

Vivid Recollections and Global Travels

But it wasn't the language system that grabbed writer Christopher Robbins' attention. It was the wild tales:

* Being strung along by Prince Rainier of Monaco, who allegedly welcomed Thomas' proposal to create an artificial island for an international university, then used the idea in 1963 to build a casino.

* Taking LSD in Mexico in 1958 with the wife of Aldous Huxley and the co-founder of Esalen, the New Age center in Big Sur.

* Capturing SS Maj. Gustav Knittel, who massacred American POWs during the Battle of the Bulge.

* Escaping French concentration camps and prisons half a dozen times during World War II. He even voluntarily returned to one camp after discovering that his girlfriend granted a romantic favor to a diplomat to get him out. Thomas says he didn't want to be freed under such circumstances. He also says other Holocaust victims could have escaped death too, if only they hadn't given up hope and surrendered to their fate. His own family, he believes, died at Auschwitz.

Robbins admits he initially doubted some of Thomas' tales. "There were times when I thought, c'mon," he says during a phone interview from London. "But sure enough, the documents always turned up."

Thomas showed him a letter from Rainier; Huxley confirmed the LSD episode; the National Archives had a letter from SS officer Knittel naming Thomas as his interrogator; French records outlined two of Thomas' wartime imprisonments and his distinguished service with the French Resistance.

"He was where he said he was, when he said he was," says Robbins, who is splitting royalties from the biography with Thomas, an accepted publishing arrangement.

Robbins draws an analogy: If someone claims he drank a Coke on a train to London, and he can show you the train ticket, you tend to believe the part about the Coke

too.

OK, but what if the person with the train ticket says he drank a Coke and defused a dozen ticking bombs in the caboose?

We compared several of Thomas' accounts of his role in historic events with other records and recollections.

On April 29, 1945, Thomas says, he tagged along with a battalion from the 157th Infantry Regiment on a historic mission.

"I was with combat troops to liberate Dachau," he says.

"Who wasn't?" says Army archivist Mary Haynes, noting the proliferation of Dachau liberator claims in recent years. Reconstructing war scenes is an inexact science, but Dachau is documented better than most. Shortly after storming the camp, American soldiers angry at the Holocaust horrors they uncovered gunned down unarmed German troops. Three days later, the Army took sworn testimony from 38 witnesses and filed a report that outlined how the camp was liberated. That report, believed lost, resurfaced at the National Archives in 1991.

Thomas' Dachau account relies on a memory system he says he devised as a child that enables him to relive past events in his mind.

Indeed, his biography is laced with vivid recollections, from his first erotic experience at age 3 (reaching up the skirt of a nanny) to teenage travels with Arab camel caravans in Tunisia to playing boule slot machines in the foyer of Monte Carlo's casino in 1941, where he pocketed a tidy sum over four months by "pulling the

lever with exactly the same pressure every time." (Casino officials, after consulting their archives and various experts, say the type of slot machine Thomas describes "to our knowledge was never in Monte Carlo.")

In the book, Thomas draws a parallel between gambling and fearlessness in combat. "I felt like a gambler at the roulette table who has amassed a mountain of chips on a long winning streak. You are only cautious with the original stake and can afford to lose when you are playing with winnings. It isn't real money. That is how I felt with my life. I had a powerful wish to fight the enemy and in situations of danger I felt my life had been won. It was a part of my winnings from the camps and the Resistance."

Accounts of the Day Dachau Was Liberated

On the day Dachau fell, Thomas says, he was a U.S. Counter Intelligence Corps officer who temporarily joined two columns of tanks and infantry rolling through the German town to the camp.

He says he didn't have orders assigning him to the 157th Regiment: "I just went there. I could choose wherever I wanted to go."

Did anyone from the 157th know he was along for the ride?

"They all knew I was there."

However, the commander of the battalion, Lt. Col. Felix Sparks, now a retired brigadier general and former justice of the Colorado Supreme Court, says he would certainly recall if Thomas had accompanied the 200-

member force: "He's got the right battalion, that's correct, but there were no CIC [Counter Intelligence Corps] with us." Ian Sayer, co-author of "America's Secret Army," a history of the CIC, says his records don't specify when the first CIC agents arrived at Dachau, but they do show their unit. It isn't Thomas'.

Thomas' version of how the camp was liberated differs from eyewitness accounts and National Archives records, says retired Lt. Col. Hugh F. Foster III, who has been researching the liberation for five years.

Regarding Thomas' mention of tanks, Foster says there were no tanks because the bridges between the town of Dachau and the military camp across the river had been blown up. Thomas doesn't recall a river.

Thomas says he entered the camp through the front gate, after the Germans waved white flags and opened fire on his group. But Foster and Sparks say the battalion deliberately avoided the front gate and circled around to another side of the sprawling camp.

The white flag incident did happen--but not to the 157th. As Sparks and his men inched through the camp, a handful of journalists and troops from the 42nd Division approached the main entrance.

Did Thomas simply confuse the two units and actually enter with the 42nd? No, he insists: "The 42nd was late." But Robbins, responding to written queries submitted later, says: "It is quite possible he arrived later than the 157th and that the troops he joined were indeed from the 42nd." In the course of writing the book, Robbins says, "research showed that it was the 157th that was involved, so it was I who assumed these were the troops he joined."

When Thomas is asked about other conflicts between his story and the one relayed by Foster, he concedes: "I was not with the front combat troops." He says he was at the camp that day but cannot say when.

Although Robbins and Thomas say he was an officer in the U.S. Army at the time, the Pentagon was unable to verify his military service. One possible explanation is a 1973 fire that destroyed some personnel files. Another is that Thomas was actually a civilian employee.

Robbins says proof of Thomas' Army credentials is in the book: a photo of his Counter Intelligence Corps ID card. Conrad McCormick, a CIC veteran and archivist at the U.S. Army Intelligence Museum in Fort Huachuca, Ariz., says the card isn't the official ID issued to full-fledged CIC agents. Rather, it's for non-American civilians hired as translators and investigators, he says. When The Times asked Thomas for his military ID number to trace his records, he declined, calling the request an insult.

"All of the men who served with him regarded him as a legitimate member of the U.S. Army," Robbins says, adding that technicalities of Thomas' service are trivial compared to the valuable work he did.

A Cache of Nazi Party Membership Cards

A few days after the liberation of Dachau, Thomas says, he embarked on another mission: rescuing 10 million Nazi Party membership files that had been shipped to a paper mill near Munich to be destroyed.

Thomas says he uncovered the files after one of his scouts spotted a German convoy at the mill. Expecting to find a cache of gold bullion, he drove to the mill,

broke in and stumbled upon wood cabinets full of Nazi membership cards. "I immediately understood how important these were and their significance," he says. So he spent hours gathering samples, posted a military guard at the mill, and alerted superiors.

How did he know the importance of the find?

"Because I looked at the cards," he says, recalling that each ID displayed a photo and personal data.

When asked if the cards specifically mentioned the Nazi Party, Thomas says: "Of course."

In fact, the cards contain no references to the Nazi Party, says George Leaman, who wrote an official history of the files for the Berlin Document Center, which houses them. "It wouldn't be obvious from the cards themselves what organization they were from," he says.

When Thomas is asked for a more detailed description of the cards, including their unusual color, he bristles: "After 60 years, I should remember the color? If I don't, that means I wasn't there? . . . You're just trying to trip me up."

Thomas says that when Army officials failed to take possession of the cards by mid-May, he leaked the story to the press. The spotlight goaded officials into moving the files to a safe spot.

But Stefan Heym, a German author who was on the scene working as a journalist for the U.S. Army and wrote extensively about the discovery, says the person who saved the cards from destruction and notified Army brass of their existence was Hans Huber, the owner of

the mill. The military even took Huber into protective custody when word of his role spread and he received threats, Heym writes.
According to articles that ran in the New York Times, London Sunday Express and two German papers at the time, U.S. Maj. William D. Browne called a press conference in October 1945 to announce discovery of the files and give credit to Huber and a German woman for bringing the cards to the Army's attention.

Leaman, the Berlin Document Center researcher, has read both Thomas' and Heym's versions and believes Heym's is "on the mark."

Thomas remains adamant. "I was wading through a mountain of documents inside the mill," he says. "Anybody who says something else is lying." Robbins adds: "I have seen documents that Michel kept as souvenirs from this horde--indeed have insisted over the years he should hand them over to a museum."

On this and other questions, the author says, "I stand by the accuracy and integrity of my book. Of course, there may be [minor] inaccuracies and different interpretations of events."

Called as Witness Against the 'Butcher of Lyon'

Then there's the trial of Klaus Barbie, which Thomas describes as one of the most wrenching chapters of his life.

In February 1943, the Gestapo set a trap at a Jewish welfare office in Lyon, France, arresting everyone who entered and deporting them to Auschwitz. Thomas says he was the only visitor to finagle his way out. Posing as a painter and pretending to speak only French during a

two-hour interrogation, he persuaded the "Butcher of Lyon" that he had entered the office by mistake, he says.

Forty years later, after Barbie was extradited from Bolivia to France to be tried for crimes against humanity, Thomas was called as a witness.

Shimon Samuels of the Simon Wiesenthal Center, who attended part of the trial, says the testimony was compelling. "He identified Barbie by recalling a [peculiar] hand movement. . . . It was a very dramatic moment. I think most people who witnessed the trial were quite impressed."

Not the prosecutor.

According to a 1987 article in the Chicago Tribune, Pierre Truche dismissed the credibility of his own witness during final arguments to the jury. After noting the difficulties of identification so long after the war, Truche urged the jury to accept every witness but one. "With the exception of Mr. Thomas, all the witnesses are of good faith," he said.

The French press also pounced on the testimony, says historian Henry Rousso. In a TV program about the trial that will air this summer on Histoire, France's satellite history channel, Rousso says the newspaper Le Monde accused Thomas of having "a taste for make-believe," and Progres de Lyon called him "a publicity hound."

But Klarsfeld, the Nazi hunter and lawyer who was part of the prosecution team, told Robbins (and The Times): "I believed Michel's evidence absolutely. . . . [Before the trial], he gave us accurate details . . . [which] he could not have known unless he was there." Further bolstering his belief in Thomas' credibility, Klarsfeld found

independent documentation that Thomas had been held in two French internment camps under the name Kroskof. (Thomas' current name is one of five aliases he used during the war; his birth name is Moniek Kroskof, he says.)

Rabbi Abraham Cooper of the Wiesenthal Center says that when Thomas came to him after Barbie's arrest, "his account fit in with other data we had. It was a plausible story, and he spoke with authority. We took what he said seriously enough to call a press conference."

On the witness stand, however, Thomas was a disaster. He attacked the court and insulted the French, Robbins says. Although his manner alienated people, that doesn't mean he wasn't truthful, Robbins adds.

In "Hotel Terminus," a documentary made after Barbie's conviction, prosecutor Truche summed up his quandary over Thomas: "Sometimes true stories seem hard to believe. I can't build a case on what is hard to believe."

Hopes of Revamping the Educational System

Whether his stories are believed or not, Thomas has always been a colorful character. As early as 1949, the Los Angeles Herald Express was chronicling his war heroics.

By the 1970s, he was married to an L.A. schoolteacher, Alice Burns, and occasionally popped up in newspaper society pages, invariably surrounded by a coterie of celebrities. In the early 1980s, after the birth of his second child, the family moved to New York. In 1992, they relocated to Israel, where he and Burns eventually divorced. Thomas returned to New York with the kids. (His ex-wife offers nothing but praise, calling Thomas

"brilliant, idealistic and very energetic.")

Throughout the 1970s and '80s, he talked about adding new language school offices in Miami, Washington and Paris, but none ever opened. During that time, several creditors and the IRS sued him for overdue bills and taxes. "I'm not a good businessman," he says, "but what ever I owed, I paid."

His talk of revamping the educational system also never got off the ground. Thomas says traditional teaching methods and their emphasis on memorization disrupt the mind's natural ability to learn.

"What you memorize, you forget," he explains. "You cram for a test and pass it, but five days later, [the knowledge] is gone."

Although vague on details, Thomas says his approach is to create excitement in students: "All you have to do is turn the key to unlock what is already there in every individual."

His teaching efforts were honored by the French language preservation organization Academie Francaise, which in 1982 awarded Thomas a medal. But whenever he has been on the verge of a deal to spread his language instruction techniques to other subjects, something goes awry, he says. Those who got cold feet over the years include the Ford Foundation, L.A. public school officials and billionaire John Kluge, he says.

Morris, his friend at UCLA, says Thomas "is a remarkably self-defeating individual in certain contexts."

In 1990, when Morris was dean of humanities at UCLA, he arranged a meeting between Thomas and the school's

foreign language faculty to discuss using his methods. It was a fiasco. "His way of interacting with the department chairs was the worst imaginable," Morris recalls. "He wouldn't tell them anything about what he does–and he revealed his contempt for what they did."

Secrecy doesn't fly in the ivory tower, Morris says: "You won't get academics to use a 'new' method unless they have some indication that it can be replicated."

But Thomas says his students are all the proof necessary. He doesn't want to reveal his methods for fear his ideas will be stolen or distorted. He adds: "It was evidently impossible for the language departments to watch someone achieve in a few days what takes them years. They couldn't stomach it."

Thomas hasn't given up–he continues to travel and teach. The latest laboratory for his methods is in Britain. Kearns, the principal whose school is experimenting with his system, got interested after reading his biography. She phoned him in New York and persuaded him to visit. Last August, Thomas spent four days teaching French to several 13- and 14-year-olds at the school. The students, who already had some French under their belts, were tested before and after the sessions. Result: Their grades rose from Cs and Ds to Bs and Cs. "Outstanding," Kearns says. If the gains hold, the school will ask Thomas about adapting his methods for wider use.

That's precisely what Thomas says he has wanted all along: a chance to revolutionize the educational establishment. As he once told Robbins with characteristic bravado: "I didn't devise my system to teach languages quickly. I devised it to change the world."

PHOTO: Michel Thomas
20010415g8iaxxke
PHOTOGRAPHER: IRIS SCHNEIDER / Los Angeles Times
PHOTO: Michel Thomas in 1945, the year Dachau was liberated by the Allies.
20010415gbn6yfke
PHOTOGRAPHER: File photo
PHOTO: A BBC documentary filmed Thomas' work teaching French rapidly to a group of British students. Another school now uses his program as well.
20010415gbnckkke
PHOTOGRAPHER: BBC
PHOTO: Thomas' stories have frequently propelled him into the public eye–most notably with his controversial testimony at the 1987 trial of Gestapo leader Klaus Barbie, above.
20010415gbndmeke
PHOTOGRAPHER: Archive photos
Type of Material: Profile
Descriptors: Thomas, Michel, World War II, Feats